No. 1112

APR 15 1946

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

(OCTOBER TERM, A.D. 1945)

C. R. MOFFITT, alias CARVEL R. MOFFITT,
Petitioner,
VERSUS
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND SUPPORTING BRIEF.

JOHN B. DUDLEY,
1501 Apco Tower,
Oklahoma City 2, Oklahoma.
Attorney for Petitioner.

ROBERT K. EVEREST,
Liberty Bank Building,
Oklahoma City 2, Oklahoma.

DAVE TANT,
Fidelity Bank Building,
Oklahoma City 2, Oklahoma.

Of Counsel.

April, 1946.

UTTERBACK TYPESETTING CO., 18 S. Walker, Oklahoma City 4, Okla.

INDEX

INDEX CONTINUED

AUTHORITIES CITED

CASES:

INDEX CONTINUED

No. .....

In the

Supreme Court of the United States

(OCTOBER TERM, 1945)

C. R. MOFFITT, alias CARVEL R. MOFFITT,
Petitioner,
VERSUS
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND SUPPORTING BRIEF.

PETITION FOR CERTIORARI

To the Honorable, the Justices of the Supreme Court of the United States:

The above-named petitioner respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

On October 17, 1944, the petitioner was charged in the United States District Court for the Western District of Oklahoma, by indictment containing three counts, of entering into a plan, scheme and device, on or about March 7, 1944, with an individual known as George Harris or Ralph Howard, for the purpose of defrauding the Mudge Oil Company, of Pittsburgh, Pennsylvania, out of the sum

of $25,000.00 by the purported sale to it of worthless oil and gas leases, and the use of the mails in furtherance of such plan, scheme and device, under Criminal Code, Section 215 (18 U. S. C. A., Section 338) (R. 1-8). On October 24, 1944, petitioner filed a demurrer to each count of said indictment, which demurrer was overruled on that day, and thereupon said cause was set for trial on December 4, 1944 (R. 8-9).

On December 4, 1944, the trial of said cause was begun, and at the conclusion of the evidence in chief of the respondent the petitioner demurred thereto as to each count of said indictment, which demurrer was overruled (R. 9-10). On December 7, 1944, the trial of said cause was concluded and thereupon the petitioner filed a motion for a directed verdict as to each count of the indictment, which motion was overruled, and on December 8, 1944, shortly after midnight, the jury returned a verdict finding the petitioner guilty on each count of the indictment (R. 10-11).

On December 11, 1944, the petitioner filed a motion for a new trial, which was overruled on March 1, 1945, and thereupon the petitioner was sentenced for a term of five years, consecutively, upon each count of the indictment — a total of fifteen years, and committed to the United States Marshal (R. 12-13).

On March 1, 1945, shortly after the entry of said judgment and commitment, the petitioner filed and served his notice of appeal under the Rules of Criminal Procedure (R. 13-15), and on March 2, 1945, filed and presented

an application for bail pending appeal, which application was denied (R. 15). In due course he made an application to the United States Circuit Court of Appeals for bail pending appeal, which was granted and his bond fixed at $7,500.00, which he gave and was thereupon released from the County Jail of Oklahoma County as a Federal prisoner (R. 15-16).

In due course he perfected his appeal to the United States Circuit Court of Appeals for the Tenth Circuit, and that Court, on March 15, 1946, affirmed said judgment and sentence as to Counts One and Two of said indictment and reversed the same as to Count Three thereof, by an order made and entered therein of that date (R. 495-503).

II.

DECISIONS BELOW

The trial court did not file an opinion. Its judgment and sentence is dated March 1, 1945 (R. 12-13). The opinion of the Circuit Court of Appeals was filed on March 15, 1946 (R. 495-502). It has not been officially reported. The judgment upon said opinion is dated March 15, 1946 (R. 502-503). No petition for rehearing was filed. On March 21, 1946, mandate was stayed (R. 503).

III.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A., Sec. 347 (a). Rule 11 of the Rules of Criminal Procedure after Plea of Guilty, Verdict or Finding of Guilt.

IV.

QUESTIONS PRESENTED

The following questions are presented:

(1) Under the Instructions as a whole did the trial court commit prejudicial error in giving the following Instruction:

> "You are further instructed that the question of intent is one that is hard to establish directly, because grown persons do not always disclose the object they have in view in any acts in which they may indulge, and you have to gather the intent from the character of the act, the circumstances surrounding it, and from conduct of a like character which may appear as tending to aid you in finding and discovering it. But in connection with all this, unless the testimony satisfies you of something else, you are warranted in holding a party responsible for the natural and probable and reasonable consequences of his act" (R. 315).

(2) Under the Instructions as a whole did the trial court commit prejudicial error in giving the following Instruction:

"You are instructed that the rule of law which throws around a defendant the presumption of innocence and requires the government to establish, beyond a reasonable doubt, every material fact averred in the indictment, is not intended to shield those who are actually guilty from just punishment, but it is a humane provision of the law which is intended for the protection of the innocent and to guard against the conviction of those unjustly accused of crime" (R. 313).

(3) Did the trial court commit prejudicial error in overruling the motion of the petitioner at the conclusion of all of the evidence to direct the jury to return a verdict of not guilty as to Count Two of the indictment? (R. 11).

V.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The reasons upon which petitioner relies for the allowance of the writ are:

(1) The Tenth Circuit, in holding that the above-quoted Instruction on "intent" was not prejudicial, is in conflict with the rule announced by: (a) The Eighth Circuit [*Shaddy* v. *United States*, 30 Fed. (2d) 340; *Cummins* v. *United States*, 232 Fed. 844; *McCallum* v. *United States*, 247 Fed. 27]; (b) the Sixth Circuit (*McKnight* v. *United States*, 115 Fed. 972); and (c) the Seventh Circuit (*Hibbard* v. *United States*, 172 Fed. 66). Such rule is not in harmony with the rule announced by this Court (*Chaffee* v. *United States*, 85 U. S. 516, 21 L. Ed. 908; *Coffin* v. *United States*, 156 U. S. 432, 39 L. Ed. 481; *Agnew* v.

United States, 165 U. S. 36, 41 L. Ed. 624), and by the Tenth Circuit itself. [*Laws* v. *United States*, 66 Fed. (2d) 870].

(2) The Tenth Circuit, in approving the above-quoted Instruction on presumption of innocence, is in conflict with the Fifth Circuit [*Comila* v. *United States*, 146 Fed. (2d) 372; *Coffin* v. *United States*, *supra*]. Said Instruction is fundamentally wrong and limited and weakened the Instructions theretofore given upon "Presumption of Innocence" and "Reasonable Doubt."

(3) The Tenth Circuit, in holding that the evidence was sufficient as to the use of the mails as to Count Two of the indictment, announced a rule in conflict with the Eighth Circuit [*Brady* v. *United States*, 24 Fed. (2d) 399]; the Third Circuit [*Freeman* v. *United States*, 20 Fed. (2d) 748; *Davis* v. *United States*, 63 Fed. (2d) 545; *Whealton* v. *United States*, 113 Fed. (2d) 710]; the Seventh Circuit [*Mackett* v. *United States*, 90 Fed. (2d) 462]; the Second Circuit [*United States* v. *Baker*, 50 Fed. (2d) 122]; the Sixth Circuit (*Underwood* v. *United States*, 267 Fed. 412). The rule announced is apparently in conflict with its previous decision [*Rosenberg* v. *United States*, 120 Fed. (2d) 935].

(4) There is no conflict in the record as to the nature, character and extent of the evidence as to the proof of the use of the mails as to said Count Two, and there is presented the question of whether or not as a matter of law the motion for directed verdict as to this count should have been sustained.

WHEREFORE, It is respectfully submitted that this petition for writ of *certiorari* to review the judgment of the Circuit Court of Appeals for the Tenth Circuit should be granted.

JOHN B. DUDLEY,
1501 Apco Tower,
Oklahoma City 2, Oklahoma.

Attorney for Petitioner.

ROBERT K. EVEREST,
Liberty Bank Building,
Oklahoma City 2, Oklahoma.

DAVE TANT,
Fidelity Bank Building,
Oklahoma City 2, Oklahoma.

Of Counsel.